

# EXHIBIT A

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 SECURITIES AND EXCHANGE  
5 COMMISSION,

6 Plaintiff,

7 v.

23 CV 4738 (KPF)

8 COINBASE, INC. and COINBASE  
9 GLOBAL, INC.,

10 Defendants.

Conference

11 -----x  
12 New York, N.Y.  
13 July 13, 2023  
14 10:15 a.m.

15 Before:

16 HON. KATHERINE POLK FAILLA,

17 District Judge

18 APPEARANCES

19 NICHOLAS MARGIDA

20 PETER MANCUSO

21 LADAN STEWART

22 BEN KURUVILLA

23 Attorneys for Plaintiff

24 WACHTELL LIPTON ROSEN & KATZ

25 Attorneys for Defendants

BY: WILLIAM SAVITT

-and-

SULLIVAN & CROMWELL, LLP

BY: STEVEN R. PEIKIN

1 (Case called)

2 MR. MARGIDA: Good morning, your Honor, Nick Margida  
3 on behalf of the Securities and Exchange Commission.

4 MR. MANCUSO: Peter Mancuso with the Securities and  
5 Exchange Commission. Good morning, your Honor.

6 THE COURT: Good morning.

7 MS. STEWART: Good morning. Ladan Stewart with the  
8 SEC.

9 MR. KURUVILLA: Good morning, your Honor. Ben  
10 Kuruvilla for the SEC.

11 THE COURT: Good morning to each of you.

12 At the back table. Thank you. Mr. Savitt.

13 MR. SAVITT: William Savitt for Coinbase and Coinbase  
14 Global. Good morning.

15 THE COURT: Good morning.

16 Mr. Peikin.

17 MR. PEIKIN: Good morning. Steven Peikin for Coinbase  
18 and Coinbase Global.

19 THE COURT: Thank you so much. Please be seated.

20 Welcome to those of you in the gallery, some of whom I  
21 suspect are working on this case in one capacity or another.  
22 This is our initial pretrial conference in this case and it is  
23 as well a premotion conference.

24 Just a couple of housekeeping things at the beginning.  
25 Typically, my practice for having premotion conferences is to

1 do two things.

2 One is to try and persuade the moving party not to  
3 file a motion, but I'm confident that will fail here, so I am  
4 not going to try it.

5 The second is to see whether there is a desire on the  
6 part of the nonmoving party to amend the pleadings at issue, so  
7 I'll talk about the commission about whether there is an  
8 appetite for that.

9 I understand as well that there is some discussion  
10 about a motion to strike. Without prejudging the matter, I  
11 don't know enough about it to know how I feel about it. To me,  
12 it just seemed like it would be a bit of a waste of time at  
13 this stage. I am not sure what it would accomplish. If the  
14 commission is of the view that it would dramatically affect the  
15 progress of discovery or something else, I will hear from you.

16 What I'd like to do in the first instance is to hear  
17 from the commission about their complaint and about any desire  
18 to amend or supplement the complaint, but not to hear from the  
19 commission in response to the motion.

20 I would then like to hear from someone at the back  
21 table and the contemplated motions, and I have some questions  
22 for them in that regard.

23 Then I'll hear from the commission regarding their  
24 opposition to the motion.

25 There is one other thing I would just like to put out

1 there. I have thought very hard about how to say this, and I  
2 am not sure I will not say it as precisely as I'd like to.  
3 There is a sense of time sensitivity and urgency to the  
4 parties' submissions, and I have no doubt that people have been  
5 working extremely hard on this case for weeks, if not months,  
6 if not years. And I have no doubt that both sides could put  
7 together quite professional, quite wonderful submissions on  
8 short time frames, but I need to communicate to you, just so  
9 that no one is unaware of this, that I have a very busy July  
10 and August, and then I go into a four to five-week RICO trial  
11 that will consume my September into October.

12 So as you are thinking about what is an appropriate  
13 briefing schedule, and I invite the parties to speak offline  
14 about what is an appropriate briefing schedule, please  
15 understand that I can't, unless there is a reason that has not  
16 yet been provided to me, allow this case to leapfrog the  
17 criminal and other urgent matters. I have also, for those of  
18 you who understand the concept, a Hague Convention, a parental  
19 kidnapping hearing that's coming up as well. All of those have  
20 to take place first.

21 I don't want you to think that I don't care about your  
22 case. Of course I do. But I do want us all to be realistic.  
23 I don't want you, for example, to wreck all of your summer  
24 vacations to get me something in the month of August that I'm  
25 not going to get to in the next couple of months. Please,

1 please, keep that in mind. And, of course, if there is a  
2 reason for immediacy that hasn't been expressed to me, you will  
3 certainly let me know, but that is the concern that I have.

4 Let me then please begin with the SEC. I don't know  
5 who wants to talk about the complaint.

6 Mr. Margida, you're getting up. Thank you so much.

7 MR. MARGIDA: Thank you, your Honor.

8 First of all, with respect to your Honor's --

9 THE COURT: Let me say that this courtroom is known  
10 for its acoustic challenges. I appreciate the respect, but if  
11 it ends up that we all can't hear you just because of the sheer  
12 number of people in here, I will take no offense if it's easier  
13 for folks to sit down.

14 MR. MARGIDA: Please let me know if you can't hear me.

15 First, your Honor, with respect to your question about  
16 whether the SEC would intend to amend its complaint, we don't  
17 think that's necessary at this time.

18 I don't know how much your Honor would like to hear  
19 about the complaint, but I'm happy to start. If you have any  
20 questions, let me know.

21 THE COURT: I am not sure we have had the pleasure of  
22 working with each other previously, sir. So please know, I  
23 have read the complaint, I have read all the materials that  
24 have been given to me, and I have in fact prepared for this  
25 conference. I do not need you to summarize. If there are

1 things you want to call my attention to, that's great. But if  
2 the issue is one of making sure I have read the document, I  
3 promise you that I have.

4 MR. MARGIDA: Thank you, your Honor. That's helpful.

5 As we lay out in the complaint, I just want to kind of  
6 frame the case about what the complaint says and put aside kind  
7 of the lamentations and grievances of Coinbase that they  
8 identify in the preliminary statement of their answer. We  
9 think, respectfully, that this is a pretty straightforward  
10 case. I know --

11 THE COURT: You see me smiling. If I had a nickel for  
12 every time someone told me it was a straightforward case, I  
13 could retire. OK. Fine.

14 MR. MARGIDA: We teed this up in the premotion  
15 submission response, that it really has to do with the  
16 application of a strict liability statute to one overarching  
17 question, putting aside the staking Section 5 arguments.

18 With respect to the Exchange Act registration  
19 violations that we allege, there are three elements. One is,  
20 Coinbase admits it's not registered with the SEC in any  
21 capacity. Two are the cryptoassets, do they engage in activity  
22 that could be -- that's consistent with what the Exchange Act  
23 rules say about National Securities Exchange activity,  
24 brokerage activity, clearing agency activity.

25 THE COURT: Just to that point, sir, at what level are

1 you asking me to focus? You're asking me to focus on the  
2 assets themselves or on what's being done with them on the  
3 Coinbase platform?

4 MR. MARGIDA: That's a good question, your Honor.

5 We are asking you to focus on the securities that  
6 Coinbase allows to be transacted on their platform and that  
7 they offer by and through the Coinbase Wallet application and  
8 through the Prime service, which gives access to the platform  
9 to their institutional and other customers.

10 The only thing that's in dispute, your Honor, and I  
11 think both sides agree on this, is whether the cryptoassets  
12 that Coinbase makes available on its platform are fairly  
13 characterized as investment contracts or not. And obviously  
14 the parties have laid out their legal arguments. Respectfully,  
15 Coinbase accuses the SEC of seeking to create new regulations  
16 and new law.

17 THE COURT: Sir, I am advised by my deputy that your  
18 microphone is cutting out. Perhaps you can be seated, sir,  
19 because I do want to make sure we all can hear you. In fact,  
20 my deputy, who knows all things, suggests that it's better if  
21 you remain seated. I really do appreciate it. Apologies for  
22 our not great technology. Thank you.

23 MR. MARGIDA: Coinbase accuses the SEC of creating new  
24 law in this area, a regulatory power grab, but Coinbase's legal  
25 arguments, and I know we will get into this later, are



1 effectively asking the Court to create new law with respect to  
2 a common law contract requirement that the *Howey* test and the  
3 *Howey* case does not include, and no case in 75 plus years of  
4 *Howey* jurisprudence has held this.

5           Additionally, I think the bigger argument is just that  
6 *Howey* can never apply to secondary market transactions. I  
7 think as we laid out in our complaint, that's just illogical  
8 and it's contrary to economic reality, which is what *Howey*  
9 requires the Court to look at. Coinbase has marketed these  
10 cryptoassets as speculative investment opportunities. They  
11 have asset pages that include historical price and volume  
12 information.

13           THE COURT: Thank you, sir. I think we are starting  
14 to trend into their motion, and I promise you I will give you  
15 that opportunity to speak. I am, again, focusing on your  
16 complaint. If there is something that you think I'm not  
17 focused on or something that you just think is very, very  
18 important and might get overlooked in the many pages of your  
19 complaint, please, sir, tell me what that is.

20           MR. MARGIDA: That's helpful.

21           What I'd like to frame for the Court is why this  
22 matters, and I think we go into that in some of the background  
23 of the securities laws and background of cryptoassets  
24 themselves.

25           The Exchange Act requirements cannot be viewed as just

1 some statutory requirement. They matter for purposes of  
2 investor protection. With an entity such as Coinbase, if it  
3 were registered as an exchange, clearing agent, or broker,  
4 there are requirements -- opening up books and records to the  
5 SEC, providing onsite inspection -- to allow the SEC to provide  
6 oversight.

7 And so what we have alleged in the complaint is,  
8 essentially, Coinbase wants a just-trust-us system and the  
9 Exchange Act requires a trust-but-verify system, so that's  
10 something that I think is important to frame for the Court.

11 THE COURT: Let me just say this, sir. Again, we will  
12 probably have a greater discussion about this in a little bit.  
13 I understand the reliance on *Howey*, and I understand there is  
14 this sort of contract aspect to *Howey*.

15 But there is a question about the efforts involved in  
16 the underlying cryptoassets. I think that's where perhaps  
17 there is some traction to the defendants' arguments. I know  
18 you don't agree with it, and the question I'll have for both of  
19 you, spoiler alert, is that I'd like to know what I really can  
20 decide on the record before me and on the stuff I may properly  
21 consider in this context.

22 But you can keep talking about *Howey*, and that's  
23 great, but there are several parts to *Howey* that I want to  
24 understand better than I do.

25 Please continue, sir.

1 MR. MARGIDA: Sure, your Honor.

2 With respect to the efforts of others, and I can  
3 elaborate later on this in response to Mr. Savitt's or Mr.  
4 Peikin's arguments, the efforts as alleged in the complaint are  
5 the efforts of the issuers, promoters, and developers of the  
6 tokens and their associated technologies. We are not alleging  
7 that Coinbase engages in efforts with respect to *Howey* for the  
8 Exchange Act registration violations.

9 We are, with respect to the staking allegations in  
10 Section 5, under the '33 Act, alleging that Coinbase engages in  
11 significant entrepreneurial and managerial efforts. But for  
12 purposes of the Exchange Act violations, it's an investor -- I  
13 think our argument would be, an investor does not distinguish  
14 between buying directly in an initial offering versus buying on  
15 Coinbase's platform. In both instances, it's relying upon and  
16 reasonably expecting to profit based on the efforts of the  
17 issuers themselves and the developers of the associated  
18 networks, platforms, technologies, gains, etc., that we have  
19 alleged with respect to the 13 cryptoassets securities in our  
20 complaint.

21 THE COURT: Thank you very much.

22 Is there someone at the back table who wants to take  
23 the lead on this? That might be Mr. Savitt.

24 Mr. Savitt, you're also welcome to sit down in  
25 deference to our court reporter, if you're comfortable doing

1 that.

2 MR. SAVITT: Thank you, your Honor. I am not sure I'm  
3 comfortable doing it. It just seems sort of wrong.

4 THE COURT: It does to me too, I understand that, but  
5 we all want to hear you, sir.

6 Let me please ask this, sir. I have not seen an  
7 answer like the answer that was submitted in this case.

8 One of the things that I've had to learn as a judge  
9 and moving from the sort of criminal side of the house to the  
10 civil side is the stuff that I can properly consider in the  
11 context of a dispositive motion. I know what answers usually  
12 look like, and they don't usually have preliminary statements  
13 that are so heavily footnoted and argumentative. That's fine.

14 I guess my questions in the first instance are, why is  
15 it that in this context I can consider your preliminary  
16 statement? To me, it seems as though it's a lot of very  
17 helpful information to you, but I am not sure that it's the  
18 totality or the sum of information on the issue that's out  
19 there.

20 How can I consider it? How is it that I can decide,  
21 based on basically your preliminary statement, as a matter of  
22 law, that the cryptoassets are not securities and that the  
23 stuff in which your clients are engaged does not bring them  
24 within the securities laws? And I appreciate you allowing me  
25 the indulgence of that long question.

1 MR. SAVITT: Thank you, your Honor, and it's a fair  
2 one.

3 Without wanting to concede that answers like this are  
4 entirely unconventional in all contexts, the question the Court  
5 has put I think is a really is sound one, which is, for  
6 purposes of this pleading motion, which it is, what is the  
7 factual weight that the Court can give to the untested  
8 pleadings in our answer, confident, though we are, of their  
9 accuracy.

10 And I think the right answer, your Honor, is that for  
11 purposes of the motion for judgment on the pleadings that we  
12 have sought leave to file and hope to file, the Court need look  
13 no further than the complaint that the commission has filed and  
14 the documents incorporated by reference into it and relied upon  
15 by the SEC and other documents that are properly cognizable  
16 upon judicial notice. That's a long-winded way of saying, we  
17 don't expect to ask the Court to rely on the allegations in the  
18 answer, confident, though we are, of their accuracy for  
19 purposes of the Rule 12(c) motion.

20 And there are other reasons why we thought it  
21 appropriate and salutary to include the allegations that are  
22 there; among other reasons, to ensure that there wouldn't be a  
23 claim, that the affirmative defenses, for example, that we have  
24 raised are inadequately supported factually.

25 But in terms of what's before the Court on 12(c), we

1 will not be relying on the unverified assertions in the answer,  
2 notwithstanding that we are confident they are going to pull  
3 through as a matter of proof.

4 THE COURT: I didn't think you'd cite anything to me  
5 that was incorrect. I just wondered if there might be  
6 competing information or competing evidence that your  
7 adversaries would ask me to consider in the context of a motion  
8 for judgment on the pleadings, such that I wouldn't be able to  
9 decide the issue as a matter of law.

10 It seemed to me, at first blush, that there are points  
11 that you make that are interesting and that I really would like  
12 to explore, but they seemed to sound more in summary judgment  
13 than in judgment on the pleadings. So I am interested as to  
14 how I can be as confident as you currently are, based on solely  
15 on the materials that I may properly consider in a 12(c)  
16 context, that I will be able to make the findings that you wish  
17 me to make.

18 MR. SAVITT: Our position, your Honor, and we will  
19 have, we hope, the opportunity to elaborate this to the Court  
20 in full briefing --

21 THE COURT: Of course.

22 MR. SAVITT: -- is that boiled all the way down on the  
23 essential issue that I think is going to be before the Court on  
24 the Rule 12(c) motion is the following.

25 The commission has claimed that certain of the tokens

1 trading on the Coinbase platform are trading there in violation  
2 of the securities laws. The entire rationale for that  
3 contention is that these assets constitute investment contracts  
4 and, therefore, fall within the purview of the SEC's regulatory  
5 jurisdiction, which is broad within the universe of securities,  
6 but stops at the water's edge. If it's not a security, the SEC  
7 shouldn't regulate it.

8 THE COURT: Just to that point, sir, I don't think  
9 you're suggesting in your answer that the activities that are  
10 going on on the Coinbase platform and in Wallet and in Prime  
11 are, in the colloquial sense, trading. Your argument is that  
12 the things that are being traded are not assets subject to the  
13 securities laws.

14 Do I understand that correctly?

15 MR. SAVITT: I think that's fair. They do not  
16 constitute investment contracts, as that idea is properly  
17 understood, and, therefore, the claims of our good adversaries  
18 must fail. That is, in a sense, the boiled-down version of the  
19 essential point.

20 The reason we think that it is susceptible of a motion  
21 in this posture is that we think we will be able to show,  
22 through an appropriate exposition of the case law, that to  
23 qualify as an investment contract, a contract or scheme of  
24 related contracts must represent participation in a business  
25 enterprise. That is what we intend to show your Honor upon the

1 motion for judgment on the pleadings. An investment contract  
2 will show that an investor pays money in exchange for an  
3 entitlement to a future payout of some sort. That's what turns  
4 an investment contract into a security. It's why an investment  
5 contract is a security. We will show that that is the  
6 essential defining characteristic.

7 THE COURT: If I could pause you for a moment, sir. I  
8 did appreciate and it was obvious that each side had put a lot  
9 of effort into the premotion letters, so I applaud you for  
10 getting them within page limits, and I thank you for that.

11 I guess I'm wondering, is what has been given to me in  
12 the premotion letters the bulk or the totality of the cases on  
13 the issue? I am not sure there is a lot of case law in this  
14 area. I do feel like I'm breaking new ground. I'm wondering,  
15 sir, if you want to comment at this stage, on the three cases.  
16 I believe there was a New Hampshire, a Connecticut, and a  
17 Southern District of Florida case cited by the commission in  
18 its opposition to your premotion letter.

19 MR. SAVITT: I think those cases, your Honor, if I'm  
20 recalling correctly, related to the question of secondary  
21 trading on the platform, and the SEC in its brief colloquy with  
22 the Court this morning has drawn attention to that.

23 A few things that we want to make sure in this early  
24 posture, your Honor.

25 First, our position is not that something that trades



1 on a secondary market can never be an investment contract.  
2 That is not our position. It's not what we said. It's a  
3 caricature of our position.

4 The following is true, that we think that for  
5 something to qualify as an investment contract, it must create  
6 some promise of contractual relationship of obligation between  
7 the buyer of the asset and the issuer or promoter, and that to  
8 qualify as an investment contract, one must have an investment  
9 of money that constitutes a claim upon the proceeds of the  
10 business, as opposed to the things it creates.

11 I'm warming to your question, your Honor.

12 THE COURT: I know you're getting there eventually.

13 MR. SAVITT: I will get to it.

14 That is our essential claim. We think that's clear  
15 with respect to the totality of trading in the cryptoassets  
16 generally. We aren't here to litigate every cryptoasset  
17 trading anyplace anywhere. We have been confronted with the  
18 claim. The 12 assets trading on our platform are unlawful and  
19 that's what we are going to focus on.

20 It is true, however, and we said this in our letter,  
21 and perhaps this is what the commission was picking up on, that  
22 to the extent any of these tokens can be said to be investment  
23 contracts in the context of an initial offering, they certainly  
24 cannot be said to be that in the context of the secondary  
25 trades that are occurring on the Coinbase platform, because in

1 those trades nothing is traveling with the sale, except the  
2 token itself, in exchange for a payment of fiat or digital  
3 currency. That is not an exchange of value that carries any  
4 ongoing obligation to anyone and it is not an exchange of value  
5 that constitutes an investment or a claim on the return of the  
6 issuer or the promoter now.

7           The cases that have been cited in the SEC's letter on  
8 this we think do not stand for the proposition that secondary  
9 trades are incapable of -- that there is no distinction, I  
10 should say, between secondary trades on the one hand and  
11 primary trades on the other.

12           In fact, I'm grateful for the Court's question because  
13 this *LBRY* case that is the first case cited, and I think it's  
14 pronounced library, even though there is some vowels missing in  
15 it, in its case name, the SEC -- and I think this is emblematic  
16 of what's happened here -- the SEC cites that case to claim --  
17 and I'm quoting now from the letter -- that there is no  
18 distinction between investors who purchased cryptoassets  
19 directly from the issuer and those who purchased them on a  
20 secondary platform.

21           Respectfully, your Honor, that's just not what that  
22 case says. It's just not what it says. In that case, in the  
23 *LBRY* case, the SEC repeatedly refused, notwithstanding the  
24 district court's preference, to put at issue to evaluate the  
25 question at all whether secondary cryptotrades could be trades

1 and securities.

2 Here is what Judge Barbadoro said in the District of  
3 New Hampshire. I am quoting now. "I would like the issue of  
4 secondary trading to be resolved. The SEC has rejected every  
5 suggestion I have made that they should resolve that issue with  
6 me. That's from a transcript.

7 And reflecting that position, the *LIBRY* court just  
8 this week, I think it was two days ago, issues an order that  
9 specifically declined to say whether secondary trades are  
10 security trades and specifically made clear in issuing its  
11 remedial order in that case that the case could have no effect  
12 on the secondary token market.

13 So the commission's assurance to the Court that *LBRY*  
14 drew no distinction between secondary trading and primary  
15 trading or initial trading is just wrong. It's just not what  
16 that case says. We don't think that's correct.

17 I will return, however, to my long introduction, your  
18 Honor, to your good question to say that our first argument is  
19 that the proper inquiry as to whether these investment  
20 contracts looks to issues that go over the question of whether  
21 they are secondary or initial trades. The argument is even  
22 more powerful here on the secondary market, but we do not say  
23 that there are not circumstances one could imagine in which  
24 assets or securities are traded on a secondary market and they  
25 are within the scope of the securities laws, just not on the

1 pleadings in the commission's case and documents incorporated  
2 therein.

3 THE COURT: The commission seems to think that your  
4 clients were provided with adequate notice, at the very least,  
5 in the form of the Dao report. Do you want to comment on the  
6 degree to which one can intuit anything from that report that  
7 could lead you to have expected that you'd be where you are  
8 today?

9 MR. SAVITT: Thank you, your Honor.

10 We, first of all, would observe that that report said  
11 absolutely nothing about trades about on a secondary market,  
12 such as Coinbase. We don't agree that it provided fair notice.

13 Moreover, the whole matter of how we got to where we  
14 are we think is importantly colored by the SEC's careful review  
15 of Coinbase's S-1, its declaration of effectiveness of that  
16 S-1, the commencement of trading, the remarks that we put in  
17 our letter, and I'm sure the Court doesn't need me to rehearse  
18 about what Chair Gensler has said about the lack of regulatory  
19 authority.

20 There is, moreover, the overhang here of Coinbase  
21 having, over the course not just of weeks, months, but of  
22 years, seeking engagement with the SEC and a reasonable  
23 regulatory regime to understand what the SEC viewed as its  
24 regulatory lane and what could appropriately be within it.  
25 That has been entirely withheld, and we appreciate it very

1 much.

2 I did not want to fail to come back to your  
3 introductory remarks that you have a very busy docket and lots  
4 and lots of stuff to get to. We, of course, understand that.  
5 But one of the reasons that Coinbase is keen to move with  
6 dispatch here, of course with your Honor's schedule, is that  
7 the SEC has filed a serious set of allegations. It attacks  
8 Coinbase's business in some ways. It puts a cloud over the  
9 business.

10 We think that cloud is going to be, with certainty,  
11 dispelled as a matter of law, whether it's in a preliminary  
12 motion, which we think is the case, certainly thereafter if  
13 not, and it's important from our perspective to try to get  
14 clarity on these matters so that there can be a more coherent  
15 and cognizable regulatory regime. That's, in a sense, why we  
16 are asking for dispatch in not just the briefing on the 12(c)  
17 motion, but the case in its entirety. I say that fully  
18 appreciating that there will be things well ahead of us in the  
19 cue, and of course we will work with your Honor and your  
20 schedule and all of that.

21 THE COURT: Again, sir, I've asked you questions that  
22 interest me. I am going to be returning to the front table in  
23 a moment to ask them some questions sort of suggested by the  
24 answers that you have given.

25 Is there anything else that you want me to know about

1 your contemplated motion? I am quite confident I can't  
2 dissuade you from filing it.

3 MR. SAVITT: Your Honor, we think it's a meritorious  
4 motion, and we'd like to file it if the Court will permit us.  
5 I think that's a no on that question.

6 On the merits of the motion itself, we have tried to  
7 pack a lot into our letter, and the exercise of writing it all  
8 in three pages is a useful one from our perspective, so I will  
9 say thanks to the Court for imposing that restriction on us.  
10 It's a great exercise in distillation.

11 There is a rich body of case law about what investment  
12 contracts are and how they have been perceived by the courts  
13 and the commission. There will be a lot more for the Court to  
14 consider when that motion is fully briefed. But we do think  
15 that we provided the bones of the argument for the Court's  
16 evaluation.

17 So if the Court has no questions on that or the major  
18 questions piece of it that follows in train, we are happy to  
19 recede and turn the floor back over to our adversary.

20 THE COURT: Then there are two follow-up questions.

21 The first is, perhaps I don't think I understand well  
22 enough to opine on the portion of the SEC's complaint that  
23 deals with your client's staking program. If you want to talk  
24 about the staking program and why I shouldn't be worried about  
25 it, even as the SEC is worried about it, I would appreciate

1 that. Thank you.

2 MR. SAVITT: Staking is a means of verifying the  
3 transactions that occur on the blockchain of the respective  
4 tokens and platforms and trade at Coinbase.

5 As we previewed in our letter, the staking program  
6 fails as a matter of law to establish the requisites for  
7 regulation under the securities laws because there is  
8 ultimately no risk to the staking party because of important  
9 guarantees that the principal will be returned.

10 Moreover, the staking program involves, essentially,  
11 the provision of administrative and IT support, rather than the  
12 risk of loss, and, therefore, it is in the nature of a supply  
13 contract, a services contract, not in the nature of an  
14 investment contract or a security. And we think we will be  
15 able to show that here again based on the inadequacy of the  
16 pleadings rather than anything that we have stated  
17 affirmatively in the preliminary statement of the answer.

18 THE COURT: Your view, sir, is that it's just the  
19 equivalent of a broker holding a trade?

20 MR. SAVITT: It's the equivalent of a payment for a  
21 service with a shared return between the -- Coinbase provides a  
22 service and, in response, it generates some profits that are  
23 divided between Coinbase and the staking party, and there is no  
24 risk of loss to the staking party, and it's ultimately an  
25 administrative and IT function rather than an investment

1 function.

2 THE COURT: I appreciate the clarity with which you  
3 have described that. I am not sure your colleagues at the  
4 front table hold the same view of the staking program and  
5 perhaps that's causing me a bit of confusion.

6 You also were kind enough to remind me about the major  
7 questions doctrine, and I actually thought I understood the  
8 major questions doctrine, and then the Supreme Court issued a  
9 decision a few weeks ago, and I'm now beginning to wonder what  
10 I understood.

11 I understood it as an issue of separation of powers, I  
12 understood it as an issue of what has and what should be  
13 arrogated to particular branches of government.

14 But it seemed to me that the *Biden v. Nebraska*, I  
15 believe, decision of a couple of weeks ago also seemed to focus  
16 a lot on the size, monetarily, of the issue. Perhaps you are  
17 going to argue that that portion of the decision is analogous  
18 or somehow useful in your case because we are talking about  
19 billions, trillions of dollars, but perhaps I could hear from  
20 you on the major questions doctrine. Thank you.

21 MR. SAVITT: Thank you, your Honor.

22 It's an interesting area of the law. I think  
23 ultimately it does still reduce, in its doctrinal essence, to a  
24 matter of separation of powers and the question of the  
25 appropriate scope of the exercise of agency authority.



1           From its beginnings, and particularly as it has been  
2   developed in the *West Virginia* case and in the *Nebraska* case of  
3   a week or two ago, it's correct that it inheres most powerfully  
4   in circumstances where there is clearly an important impact on  
5   economic activity. We are confident, your Honor, that that  
6   branch of the major questions inquiry will be satisfied here.  
7   Crypto is a one trillion dollar plus industry. It's an  
8   important emergent industry. One in five U.S. adults have held  
9   cryptocurrency. It has, and I think this is common ground, the  
10   capacity to significantly create innovation in financial  
11   services internationally and nationally. We don't think there  
12   is any question it will satisfy that branch of the major  
13   questions inquiry.

14           The other pieces of it that are important to ask the  
15   following sorts of questions: Is the agency exercising  
16   authority in the same way that it has previously exercised  
17   authority? Here we think the answer is plainly no.

18           Chair Gensler's remarks that there was not adequate  
19   regulatory authority over cryptoexchanges just two years ago we  
20   think is very powerful evidence that what we have now is an  
21   expansion of authority, precisely the kind of expansion of  
22   authority that was called out in many of the cases involving  
23   the major questions doctrine, including the *Nebraska* case, page  
24   6 of the slip op.

25           And there is important analogies here to what's come

1 up in these cases. The *Brown v. Williamson* case is a good  
2 example. There, after for a long time saying that nicotine  
3 wasn't a drug, the FDA said it is a drug, and the Supreme Court  
4 said you can't do that. You can't take within your regulatory  
5 authority something that you had hither to failed to, just like  
6 cryptoassets here.

7 There is also the fact relevant here that there is  
8 ongoing and intense congressional debate right now about who,  
9 if anyone, regulates crypto and how that regulatory authority  
10 should be allocated. Senator Gillibrand just yesterday, or the  
11 day before, introduced bipartisan legislation on exactly this  
12 subject, which, if I'm understanding correctly, does not assign  
13 to the SEC the regulatory authority that, through cases like  
14 this, seeks for itself. That's a bipartisan bill.

15 Putting aside what the law ultimately becomes in  
16 Congress, the fact that there have been over a dozen  
17 legislative initiatives to try and establish a regulatory  
18 regime really suggests that they have not been debating a  
19 question that's already been settled. There is even a dispute  
20 within the commission amongst the commissioners and between the  
21 CFTC and the SEC on this question.

22 For these reasons, we think this is a case that cries  
23 out for the application of the major questions doctrine.

24 The last point on this before shutting up, your Honor,  
25 is, you don't need to get to this issue, in our view, even on

1 our motion because we think when you look at the history of the  
2 investment contract law and the other law applicable to the  
3 trades on the platform and the other aspects of the  
4 commission's case staking and the rest of it, you will see that  
5 they do not qualify as securities under the prevailing  
6 precedent. But if it's a colorable claim, then the major  
7 question doctrine comes into play, and we think it powerfully  
8 influences the analysis.

9 THE COURT: Thank you, sir.

10 Mr. Margida, am I hearing from you or from someone  
11 else at your table?

12 MR. MARGIDA: It depends on the issue. There is a lot  
13 to unpack there, your Honor, so my colleague, Mr. Mancuso, is  
14 going to address some of the issues, including the major  
15 questions doctrine.

16 THE COURT: I would like to begin where I began my  
17 questioning with Mr. Savitt, which is, there was for me some  
18 confusion about the degree to which defendants were asking me  
19 to focus on the statements made in their preliminary statement.

20 I believe Mr. Savitt has attempted to clarify how he  
21 thinks I can look at that and the fact that the defendants  
22 believe that other information in the answer and in the  
23 pleadings and in the materials that I may properly consider in  
24 a 12(c) context is going to be enough for me.

25 So my first question is really one of just scope of

1 materials I may consider, if there is someone who wants to  
2 speak to that issue.

3 MR. MARGIDA: There is. Mr. Mancuso can handle that,  
4 your Honor.

5 THE COURT: Mr. Mancuso, I am sure you appreciate  
6 being volunteered, sir. Thank you.

7 MR. MANCUSO: Thank you, your Honor.

8 With regard to 12(c), your Honor hit the nail on the  
9 head. I think you were indicating that the materials that were  
10 included in the 105 footnotes to the preliminary answer should  
11 not be considered on a 12(c) motion. I am sure your Honor is  
12 very, very familiar with the standard.

13 12(c) is basically a 12(b)(6) motion, but that the  
14 Court can consider pleadings on both sides, those that are  
15 alleged in the answer, as well as information that judicial  
16 notice could take account of, as well as any documents or  
17 evidence that's integral to the pleadings.

18 If you run these cases, both in this district court,  
19 as well as the Second Circuit, to ground, that seems to be what  
20 the Second Circuit is saying, that the external documents that  
21 are not attached to the pleadings, if the Court is going to  
22 consider them on a 12(c) motion, they have to be integral to  
23 the framing of the complaint, and, therefore, the 105 footnotes  
24 in the preliminary statement are not integral to the framing of  
25 our complaint. There are certainly some documents that we do

1 reference in our complaint that are integral to the framing of  
2 the complaint, but not those that are in the preliminary  
3 statement. However, it seems like we have agreement between  
4 the parties as to what is and is not proper for the Court to  
5 consider on a 12(c) motion.

6 THE COURT: I will speak about this a little bit later  
7 on, sir, but I'm sort of hinting to the folks at the front  
8 table that I really don't want a motion to strike. I am really  
9 not convinced that we need to do a motion to strike, and I am  
10 not sure it's going to save anybody any time, but you will be  
11 able to persuade me of the contrary or not later on in this  
12 proceeding.

13 Sir, what I am told by the defense is, fine, I am not  
14 going to consider the stuff I can't consider. But if I can  
15 consider the stuff within the universe of appropriate 12(c)  
16 materials, I am going to find that your complaint should be  
17 dismissed because you have not properly alleged that these  
18 cryptoassets are in fact securities or that they are investment  
19 contracts or that somehow the conduct taking place on the  
20 Coinbase exchange is within the federal securities laws.

21 I would like to understand, because I think it is  
22 presented to me as a matter of optics, yet it is of interest to  
23 me. How do you -- and by you, I mean your clients --  
24 contextualize Mr. Gensler's testimony? How do you  
25 contextualize what he was saying about the absence of market

1 regulation of cryptoassets?

2 Is it your view that actually -- I understand, I  
3 think, that you are suggesting that this wasn't estoppel and  
4 that perhaps minds could be changed or maybe better arguments  
5 could be made. But he did seem to suggest, and I thought he  
6 was speaking for the commission when he did so, that the SEC  
7 could not or did not regulate transactions of this type. What  
8 has changed?

9 MR. MANCUSO: Your Honor, I think what we have to go  
10 back to is to the actual context of that quote, and I am sure  
11 your Honor has read it beyond just the snippet that is taken  
12 out and put in the answer.

13 THE COURT: I have.

14 MR. MANCUSO: However, I think if we go back to the  
15 actual transcript and you see that the question was asked, I  
16 believe it involved Bitcoin, which is not at issue here, and  
17 the SEC has made clear that that's not the focus of any of  
18 these enforcement actions.

19 Also, I believe it was a congressman from the House of  
20 Representatives who said, what can we do to make this safer? I  
21 don't have it in front of me, the whole quote. But from what I  
22 remember, it was what can we do to make this market more robust  
23 so that people -- the way I interpreted it is so people trust  
24 it.

25 Mr. Gensler said a couple of things about the

1 unregulated nature. There is no regulator in this space,  
2 meaning no one is currently regulating it. I think taking,  
3 there is no regulator in this space out of context and just  
4 throwing it in the answer is a nice soundbite, but it doesn't  
5 necessarily mean that the chair committed to the SEC at some  
6 point based on some conduct that violates the securities law  
7 bringing an enforcement action.

8 That's another thing that I think dovetails with the  
9 major questions doctrine, is that the SEC is not attempting to  
10 regulate all of the crypto industry in this country or around  
11 the world. We regulate conduct, and we are regulating  
12 Coinbase's conduct, which we believe violates the law.

13 And if you look and you kind of synthesize all of  
14 Coinbase's arguments, they are basically saying, in terms of  
15 the equitable arguments, what Mr. Gensler had said, the major  
16 questions doctrine, they are saying that if the SEC or some  
17 other criminal authority is looking at conduct of a crypto  
18 actor and it violates the securities law or some other law,  
19 that they don't have authority to do that because Congress  
20 hasn't given it yet. That's just incorrect and that, we  
21 believe, to be a nonsensical argument. So I think that these  
22 all have to be looked at together, and that would be my  
23 response to how the Court should view it.

24 THE COURT: Are defendants correct, and I think the  
25 answer is yes to this, that the commission is not considering

1 Bitcoin or Ether to be securities, cryptoassets from Bitcoin or  
2 Ether. Do you consider those to be securities?

3 MR. MANCUSO: I believe the commission has spoken on  
4 Bitcoin. I do not believe that the commission has spoken  
5 definitively on Ether. Certainly with Bitcoin, which I think  
6 the Court can take judicial notice of, it amounts to, and don't  
7 quote me on this exact number, but it's something like over 50  
8 percent of the crypto industry is Bitcoin.

9 THE COURT: Let me ask the question a little bit  
10 differently, sir.

11 There are certain cryptoassets as to which I believe  
12 the commission has taken the position they are not securities.  
13 There are 12 or 13 assets traded by -- or something appearing  
14 on Coinbase platforms or Prime or Wallet that the commission  
15 has taken the position, they are securities.

16 What is the difference between those that are not and  
17 those that are? And how has that been communicated by the  
18 commission to the investing public and to those involved in the  
19 space so that they know that this type of asset may implicate  
20 the securities laws and some other cryptoasset may not?

21 MR. MANCUSO: The simple answer to your Honor's  
22 question is the *Howey* analysis. And those that are not, which  
23 there is one that the commission has spoken to definitively is  
24 not, which is Bitcoin, do not meet the *Howey* element. I can't  
25 speak to all 250 assets that are currently traded.



1 THE COURT: Sir, you're not committing that the number  
2 is 12 or 13. It could be hundreds. But based on the  
3 commission's implementation of the *Howey* analysis, you have  
4 found 12 or 13 assets that meet what you understand to be the  
5 definition of securities.

6 MR. MANCUSO: We gave them as examples to the Court,  
7 that those are what we believe to be securities based on the  
8 *Howey* analysis that are being currently traded and have been  
9 traded for a number of years on the Coinbase platform.

10 However, we are not committing that it is limited to  
11 12, but I also can't take a position on all 250 because, as  
12 your Honor is aware, this is a very fact-intensive analysis,  
13 and each token has to be looked at. As you can see from our  
14 complaint, we just gave a preview of 12 tokens and each token  
15 takes two pages, three pages. That the just the tip of the  
16 iceberg. There is certainly more evidence that we will get  
17 into when we are beyond the pleadings stage. I can't sit here  
18 and just determine whether we assess a specific asset to be a  
19 security unless we do a full *Howey* analysis. We have  
20 communicated that -- I'm sorry, your Honor.

21 THE COURT: I think you're about to say what I was  
22 about to say, which is, in terms of whether that's been  
23 communicated to the investing public and those involved in this  
24 space, you're suggesting *Howey* has been around forever, they  
25 should just know, and *Howey*, by its terms, even covers novel

1 assets that may or may not be securities, such as cryptoassets.

2 MR. MANCUSO: Yes, your Honor.

3 I would also add to that that the SEC has been  
4 explicit in that it said, you have to look at *Howey*.

5 Starting with the Dao report in 2017, that analysis  
6 used factors from *Howey* and explicitly applied them to  
7 cryptoassets, so it's beyond just that the investing or the  
8 public should know about *Howey*. SEC has said that cryptoassets  
9 can be viewed under this standard. And Coinbase has  
10 acknowledged that in their filings with the commission and  
11 documents that they have distributed to their shareholders that  
12 the cryptoassets that are being traded -- we note it in the  
13 complaint for these purposes that these cryptoassets that are  
14 being traded on our platform can be subject to regulation.

15 THE COURT: I think personally, and perhaps at this  
16 stage of the game my opinion matters, it seems to me you're  
17 ascribing a little too much importance to that. I have seen  
18 registration statements. I have seen filings in cases of this  
19 type. And there are a lot of eventualities and contingencies  
20 that are covered that do not themselves amount to admissions.  
21 Saying that some day someone may determine that something is a  
22 security is a different thing than acknowledging that something  
23 is a security. So, again, I don't want you to rely too much on  
24 that.

25 I am just trying to figure out how folks involved in

1 the industry can know that a particular cryptoasset with which  
2 they are involved is or is not going to be found at some later  
3 date by the commission to be a security.

4 MR. MANCUSO: They need to do an analysis of the  
5 cryptoassets that they allowed to trade on their platform or  
6 that they have issued. We see that the industry has done this.  
7 They have created, I believe they call it a CRC -- I forget  
8 what it stands for; crypto rating council -- where there is a  
9 number of market participants that have gotten together, and  
10 they have created I think what they call a scorecard, and they  
11 use the *Howey* analysis as part of that to determine how risky  
12 their cryptoassets are in terms of, I think it's like a zero to  
13 a five scale, and how risky they think it is for being  
14 considered a security.

15 The industry has been aware of this standard and these  
16 factors could be applied. There has been several district  
17 court cases that have applied them over the past couple of  
18 years and have found that some cryptoassets are securities. I  
19 understand your Honor --

20 THE COURT: One moment, please, sir. How many  
21 district court -- you gave me three. Are there more out there?  
22 I didn't understand there to be a wealth of case law on this  
23 issue.

24 MR. MANCUSO: It's under ten, I would say. Please  
25 don't hold me to that. It's not hundreds. I know that.

1 THE COURT: Fair enough. I appreciate the wiggle room  
2 you are giving yourself. Is Mr. Savitt correct that the three  
3 that you have identified really involve secondary market  
4 trading?

5 MR. MANCUSO: I believe Mr. Savitt's point was they  
6 don't involve --

7 THE COURT: I beg your pardon. You're exactly right.  
8 I have misspoken.

9 MR. MANCUSO: Those cases were brought against  
10 issuers, so Mr. Savitt is not wrong that in a direct context of  
11 those cases that the SEC brought enforcement actions against  
12 companies that were issuing cryptoassets and not -- they  
13 weren't traded.

14 However, the district courts in those cases, in  
15 response to arguments that, well, these assets are now being  
16 traded on a secondary platform, and therefore I believe the  
17 argument went that they are no longer securities, there is  
18 language that there is no distinction or it doesn't matter that  
19 they are now being traded on secondary platforms. My decision  
20 still stands.

21 I don't agree a hundred percent with Mr. Savitt's  
22 characterization of the *LBRY* decision because the Court does  
23 discuss secondary trading. I know he quoted from, I believe, a  
24 transcript from oral argument. But we all have access to the  
25 decision, and the Court does discuss secondary trading.

1           However, back to your Honor's question, Mr. Savitt is  
2       correct that that LBRY was not running an exchange or brokerage  
3       or clearing agency. They were issuing a cryptoasset that was  
4       found to be a security.

5           THE COURT: Thank you, sir.

6           Sir, you have mentioned that there are some small  
7       modest number of cases on the issue. At least one of them  
8       predates the issuance of CGI's registration statement, is that  
9       correct?

10          MR. MANCUSO: I don't have them all off the top of my  
11       head, your Honor. I can look up what is cited in our letter.

12          THE COURT: The Southern District of Florida  
13       *Bitconnect Securities Litigation* was 2019, per your letter.  
14       Will you agree with me on that?

15          MR. MANCUSO: Yes.

16          THE COURT: Am I correct that the CGI registration  
17       statement was sometime in 2021?

18          MR. MANCUSO: That's correct, your Honor.

19          THE COURT: The defendants tell me that at the time  
20       that the commission was evaluating the registration statement  
21       there were six cryptoassets being traded on the Coinbase  
22       platform that you now say qualify as securities. Is that  
23       correct?

24          MR. MANCUSO: Factually, yes, there was cryptoassets  
25       that were trading that are now part of enforcement action, yes.

1 THE COURT: Is there some significance that I should  
2 give, or maybe there is none, to the fact that the commission  
3 issued the S-1 and didn't say, hey, watch out, guys, you're  
4 engaging in securities laws violations?

5 What I believe the defense wants me to do is to intuit  
6 from the fact that you issued the registration statement, or at  
7 least another side of the commission issued the registration  
8 state, to intuit that they felt that whatever was going on  
9 there was OK, no one was in violation of the securities laws,  
10 and that we should all be surprised that two years later we are  
11 here. Please comment on that.

12 MR. MANCUSO: Sure. The short answer is no. Your  
13 Honor should take nothing from that.

14 THE COURT: Let me have a slightly longer answer.

15 MR. MANCUSO: Your Honor, I'll say that simply because  
16 the SEC allows a company to go public does not mean that the  
17 SEC is blessing the underlying business or the underlying  
18 business structure or saying that the underlying business  
19 structure is not in violation of the law.

20 The S-1 is about disclosures, and I don't have  
21 everything in front of me. We can fully brief all of the legal  
22 and factual implications that goes on with regard to an S-1  
23 filing. But there is no way that an approval of a S-1 is a  
24 blessing of a company's entire business. In fact, there is no  
25 evidence being put forth that the SEC looked at specific assets

1 and made specific determinations and then gave Coinbase comfort  
2 that this would not later be found to be a security.

3 THE COURT: Let's just pause so I can just sort of get  
4 rid of the skepticism I currently have as I hear that answer.

5 I am not saying that the commission should be  
6 omniscient at the time it's evaluating a registration statement  
7 and that it should know all things. But I would have thought  
8 the commission was doing diligence into what Coinbase was  
9 doing, and somehow I thought that it would say, you know, you  
10 really shouldn't do this. This is violative of the securities  
11 laws, or we are kind of in some interesting uncharted  
12 territory here with respect to whether the assets on your  
13 platform are securities, so be forewarned that maybe some day  
14 there could be a problem.

15 I hear what you are saying, which is, I shouldn't give  
16 it any consideration and it doesn't absolve the defendants of  
17 any of the securities laws. Yet I'm just wondering why it is  
18 that the commission saw fit to press what they were doing,  
19 because that is kind of what they did by issuing the S-1, and  
20 that there not be any discussion about the possibility of  
21 violative conduct. Again, you may be right, but I am just  
22 viewing your answer with a measure of skepticism.

23 MR. MANCUSO: Understood, your Honor.

24 Respectfully, I would take issue again with the word  
25 blessing their conduct or their business. This is about

1 disclosures. In fact, and I think we lay it out in our  
2 complaint, that Coinbase disclosed in their S-1 that the risk  
3 that the assets that are being traded on their platform could  
4 be found to be securities, and that came from the process back  
5 and forth between --

6 THE COURT: You never could have said to them, hey,  
7 you guys need to register as a securities exchange. That was  
8 within the power of the SEC to do, was it not?

9 MR. MANCUSO: I can't really speak to that.

10 THE COURT: I think it was. I don't think anything  
11 stopped the commission from doing it. I am not suggesting,  
12 sir, that this is dispositive or that there is an estoppel  
13 issue. But it's not crazy in the Failla parlance for Coinbase  
14 to think that what they were doing was OK because it was  
15 exactly what you let them do when they issued the S-1. That's  
16 the point I'm making. You may say that they and I are reading  
17 too much into the issuance of the S-1.

18 MR. MANCUSO: I'd agree with that.

19 THE COURT: I might disagree with that, but I do  
20 understand.

21 Eventually, sir, we are going to get to the major  
22 questions doctrine, but let me ask you. You have heard me  
23 engage with Mr. Savitt in discussions about the arguments that  
24 they contemplate making. I have certainly seen your responses,  
25 at least as they are in writing. Is there something else that



1 you want me to know or do you wish to engage at a more granular  
2 level with any of the responses that Mr. Savitt gave me this  
3 morning?

4 MR. MANCUSO: Your Honor, if we are not going to talk  
5 about the major questions doctrine, you would like to talk  
6 about secondary trading or the reasons for moving to dismiss.  
7 If that was it, I will defer to my colleague to handle those.

8 THE COURT: Are you coming back for major questions  
9 doctrine?

10 MR. MANCUSO: I will be coming back, unless you want  
11 to hear about that now.

12 THE COURT: I will wait. Thank you so much.

13 MR. MANCUSO: Thank you, your Honor.

14 MR. MARGIDA: Thank you, your Honor.

15 I don't want to belabor this because I think the  
16 positions of the parties are fairly set out in the letters.

17 I do want to point out that what Coinbase is doing  
18 with respect to reading into *Howey* a contract requirement is  
19 very interesting. They acknowledge that *Howey* says an  
20 investment contract can be a contract transaction or a scheme,  
21 and in their letter they say the transaction or scheme, yeah,  
22 but associated contractual undertakings. Today I think Mr.  
23 Savitt's phrase was schemes of related contracts.

24 The SEC's position is that's just wrong as a matter of  
25 law. No court in 75 plus years has held that *Howey* requires a

1 common law contract. *Howey* itself said the paper or the  
2 financial instrument is incidental. Courts in this circuit,  
3 including *Gary Plastic* and *Glen-Arden*, have looked at what  
4 *Howey* compels, which is the economic reality of the  
5 transaction. They have looked at the series and collection of  
6 inducements, representations, what they are selling, the  
7 enterprise.

8 And Judge Castel in *Telegram* says, scheme is used in a  
9 descriptive, not a pejorative sense. And Coinbase seem to  
10 ignore the fact that courts are actually finding cryptoassets  
11 to be securities where there is no contract. *Balestra v.*  
12 *ATBCOIN* in this court is an example of that where there is no  
13 contract.

14 In *Telegram*, Judge Castel is very clear -- and I know  
15 it was in the context of, the Court found there was one  
16 continuous offering, but the Court also found that there is no  
17 ongoing -- there is no ongoing privity between what happens in  
18 like public market sales. So there is an initial offer to 175  
19 initial purchasers and *Telegram* finds -- and this relates to  
20 the secondary market transaction argument -- *Telegram*  
21 envisioned that there would eventually be secondary sales, and  
22 there is no distinction -- I'll get to that point in a minute.

23 On *LBRY*, we think it speaks for itself. Putting aside  
24 any examination of the transcript, I think the Court itself  
25 draws no distinction between primary and secondary

1 transactions. The '33 and the '34 Acts draw no such  
2 distinction. There are no such distinctions drawn in other  
3 securities market contexts, and Coinbase offers no compelling  
4 reason why we should one here.

5 Commonality. I think Mr. Savitt was hitting on like  
6 investing in an enterprise. Commonality, as your Honor knows,  
7 is about tying -- if you're talking about horizontal  
8 commonality, it's tying the fortunes of investors together, and  
9 then strict vertical commonality is about tying the enterprise  
10 itself, the people who are running the platform or network or  
11 the issuers together with investors. We have alleged in our  
12 complaint, and they have to be taken as true at this stage,  
13 that those elements are satisfied.

14 The fortunes of an investor who buys a cryptoasset  
15 security, including one of the 13 that we have alleged here --  
16 and, by the way, your Honor, the commission has spoken on other  
17 cryptoassets that are available that the commission thinks are  
18 securities. The *Wahi* litigation, insider trading litigation,  
19 named specific assets. Coinbase didn't delist any of those,  
20 except for one later when the relevant platform became defunct.  
21 We also identify in paragraph 124 of the complaint other assets  
22 that the commission has brought enforcement actions on.

23 The argument that the commission hasn't spoken until  
24 now with this complaint about assets being securities on  
25 Coinbase's platform is just not true.

1 I don't want to belabor this, but coming back to your  
2 Honor's question from earlier this morning about the reasonable  
3 expectation of profits based on the efforts of others, someone  
4 who purchases in an initial offering on a Monday, versus on a  
5 secondary platform the following week, has the same expectation  
6 of profit based on the representations of the issuers, the  
7 promoters and the developers, so I think that's pretty clearly  
8 alleged in our complaint as well.

9 If your Honor has other questions about the *Howey*  
10 related aspects, but I think our position is well set out, and  
11 we look forward to briefing the issues.

12 THE COURT: On the issue of staking, in listening to  
13 Mr. Savitt, I began thinking that the parties had completely  
14 different views of the staking program. Because the way it was  
15 being described to me by him suggested more. I believe he used  
16 the word administrative. I guess the defendants are suggesting  
17 that it's sort of a means of verifying trades and transactions  
18 and, again, something almost back office, although there is  
19 perhaps a profit-generating element to it as well.

20 Is it that you just hold two different views as to  
21 what the staking program is? Has your position been clarified  
22 by Mr. Savitt's comments to me this morning? And if not,  
23 what's violative about the staking program?

24 MR. MARGIDA: I am really confused about Coinbase's  
25 decision to move for judgment on the pleadings with respect to

1 staking because I think -- and we include a specific *Howey*  
2 analysis, and our facts as alleged are supposed to be deemed  
3 true and reasonable inferences drawn in our favor.

4 With respect to your Honor's question about the  
5 reasonable efforts here for purposes of the third element of  
6 *Howey*, Coinbase argues that they are just IT services. There  
7 is no case that says IT services can't be entrepreneurial and  
8 managerial.

9 But putting that issue aside, what Coinbase does here  
10 is far more significant than what Coinbase is saying in its  
11 answer.

12 By the way, I don't think the SEC and Coinbase dispute  
13 much with respect to staking. I think it's how you  
14 characterize the efforts and whether investor assets are  
15 actually invested and there is a risk of loss. Our position  
16 is, at least for 12(c), we have alleged that they are put at  
17 risk. I think that's pretty clear. Whether the relevant  
18 staking protocol goes under, whether private keys associated  
19 with cryptoassets that are staked get lost, whether there is a  
20 cybersecurity incident, for a number of reasons as we have  
21 alleged.

22 But the efforts, what Coinbase does, first of all, it  
23 markets this as an investment opportunity. It says: Earn up  
24 to 6 percent for the respective assets. This is applying *Howey*  
25 to the economic reality based on the perspective of an

1 objectively reasonable investor looking at the facts and  
2 circumstances. If it walks like a duck and quacks like a duck,  
3 it's a duck. This is an investment scheme, a product that they  
4 are selling, and their efforts go to establishing the necessary  
5 links with the staking protocols which involves -- I think one  
6 witness testified during the investigation -- involves creating  
7 and implementing software to establish that, providing  
8 cybersecurity protections, actually operating the validator  
9 nodes, so pooling investor assets and then staking those at the  
10 validator nodes.

11 And Coinbase -- the way staking works is, the greater  
12 number of assets that are staked at a particular node, the  
13 higher the likelihood it is that that protocol will select, in  
14 this instance Coinbase, to actually validate transactions on  
15 the respective blockchain. That increases the success of the  
16 enterprise, and Coinbase does that.

17 They also do the actual staking. They receive the  
18 cryptoassets that they distribute, that they take their  
19 commission, so their fortunes are tied with investors. If the  
20 staking program succeeds, Coinbase succeeds.

21 And then the returns are the cryptoasset rewards that  
22 the protocols provide to be the investment returns, and those  
23 are done on a pro rata basis based on the amount of assets that  
24 the customer stakes.

25 I'm confused why they are moving on staking. I think

1 we have laid out why it satisfies the *Howey* test. There are  
2 issues of fact.

3 THE COURT: Excuse me for a moment, please. I just  
4 want to check my notes.

5 Mr. Margida, just so I'm clear, I think what I'm  
6 hearing you say is, as the commission understands the staking  
7 program, it is subject to the securities laws. If it turns out  
8 your understanding of the program is wrong, you have still  
9 alleged enough in the complaint, and I must accept your  
10 well-pleaded allegations and the inferences that can be drawn  
11 from them, and I still have to find, at least at this stage,  
12 that your conception of the staking program is the one I can  
13 consider, and your conception implicates the securities laws.  
14 Yes, sir?

15 MR. MARGIDA: That's our position with respect to  
16 Coinbase's proposed motion. Like I said, with respect to the  
17 merits, I don't think Coinbase disputes a whole lot, so I think  
18 we will be successful on the merits, but I know that's not your  
19 question.

20 THE COURT: That's not my question. Thank you.

21 Perhaps I can return to Mr. Mancuso and the question  
22 of the major questions doctrine. Thank you.

23 MR. MANCUSO: Sure, your Honor. Can I clarify  
24 something from our earlier discussion --

25 THE COURT: Of course.

1 MR. MANCUSO: -- that I should have picked up on  
2 before.

3 Your Honor was asking about Mr. Gensler and his  
4 statements to Congress, and I believe they were three weeks  
5 after he became commissioner. I just wanted to note for the  
6 Court that any individual commission or statement, as I am sure  
7 your Honor has heard before, does not represent a decision. It  
8 does not speak for the five-member commission. So only the  
9 five-member commission, after taking a vote and having a  
10 majority, can issue a statement on their behalf and bind the  
11 commission.

12 THE COURT: I think it's being presented to me, sir,  
13 for background information and optics.

14 But my larger question to you and your colleagues was  
15 the manner in which the commission has made determinations  
16 about whether and when cryptoassets are securities and the  
17 manner in which that has been communicated. I think we have  
18 discussed that today.

19 MR. MANCUSO: Understood. I just wanted to clarify  
20 that, your Honor.

21 THE COURT: It is so clarified, sir. Thank you.

22 MR. MANCUSO: Thank you.

23 THE COURT: Perhaps major questions doctrine.

24 MR. MANCUSO: Sure, your Honor.

25 Your Honor was correct earlier with regard to



1 identifying separation of powers. That's what this line of  
2 cases -- although the moniker major questions doctrine has only  
3 recently been announced, when you look at Chief Justice  
4 Roberts' opinion, I believe in *West Virginia*, he cites about  
5 six cases dating back to the 1990s that form this doctrine.

6 This doctrine, if you look at all these cases, which I  
7 am sure your Honor has at least perused them, they all involve  
8 regulation beyond what the agency was allowed by Congress. Not  
9 one of them involves enforcement.

10 What's going on here is, we are not seeking to  
11 regulate the entirety of the crypto industry. We are enforcing  
12 a violation of the securities law based on Coinbase's conduct.  
13 I think that that's a very important distinction, and we have  
14 to look at it in that context.

15 I think I said this before, but it's important and I  
16 am going to say it again. Coinbase's argument seems to be that  
17 if there is a violation of securities law by a crypto company  
18 or a crypto player in the sphere, there is no power to civilly  
19 or criminally enforce that violation based on the major  
20 questions doctrine. We think that's an incorrect reading of  
21 the case law.

22 THE COURT: The decision from the court two weeks ago  
23 in no way changes your analysis. Is there anything you wish to  
24 comment on or distinguish?

25 MR. MANCUSO: No. But I think it further supports our

1 argument in that in the *Biden v. Nebraska* case, you have the  
2 Department of Education, through its secretary, completely  
3 changing -- Chief Justice Roberts says that this was not the  
4 understanding of what that statute allowed previously. It was  
5 a modification of the student loan policy. It wasn't a  
6 wholesale forgiveness. That's just not applicable to the facts  
7 we have here.

8 THE COURT: Sir, if I could just push back slightly on  
9 something you said earlier, which has been sort of percolating  
10 while you've been talking, so excuse me.

11 I thought I heard you say a few sentences ago that the  
12 question was not whether the commission wanted to regulate the  
13 entire crypto industry but whether it wanted to regulate those  
14 assets that are found to be securities. Perhaps you can just  
15 restate that position, because I want to make sure I have it  
16 with greater clarity.

17 MR. MANCUSO: Sure. The commission regulates conduct  
18 that falls under the securities law, and we believe that  
19 Coinbase's conduct has violated the securities law. That's it.  
20 We are not looking to regulate through this action the entire  
21 crypto industry.

22 THE COURT: I guess I hear you. I am just wondering  
23 where we go with that because it seems to me, in trying to  
24 determine what conduct within the industry falls within the  
25 purview of the commission, it does sort of sound to me that you

1 have to consider all of the conduct in the industry.

2 I hear you saying, I do, that it's not a question of  
3 the commission purporting to regulate the entire cryptoasset  
4 industry. But I am just saying, there is a tension between  
5 making that argument and then having to determine in this  
6 rather unique space what are the things you actually get to  
7 regulate. That's my only point.

8 MR. MANCUSO: Understood.

9 THE COURT: Anything else you would like me to know,  
10 sir?

11 MR. MANCUSO: Not with regard to the major questions  
12 doctrine, no.

13 THE COURT: Fair enough. Perhaps I should take the  
14 hint from your last statement. Is there something else you  
15 wish to speak on? And then which of you gets to speak on the  
16 motion to strike that I am trying to persuade you not to file?

17 MR. MANCUSO: That would be myself, your Honor. We  
18 will move right to that.

19 THE COURT: If there is something else --

20 MR. MANCUSO: No.

21 MR. MARGIDA: Can I just say one thing on the  
22 fair-notice issue, unless your Honor is prepared to move  
23 forward?

24 THE COURT: I do not want to foreclose you from saying  
25 something, sir.

1 MR. MARGIDA: Thank you, your Honor. I'll be brief.

2 I just wanted to point out that with respect to the  
3 Dao report, paragraph 61 of the complaint --

4 THE COURT: Excuse me for calling it the Dao report.  
5 I appreciate that.

6 MR. MARGIDA: That's fine. It took me a couple of  
7 years to figure that out.

8 Paragraph 61 of the complaint identifies the Dao  
9 report and where it emphasizes the importance of complying with  
10 the registration provisions of the securities laws, including  
11 with respect to platforms.

12 The other thing I want to note about their fair-notice  
13 defense is that, under *Brigadoon Scotch* in the Second Circuit,  
14 it's untenable to find that an investment contract is  
15 unconstitutionally vague. Challenges in the cryptoassets space  
16 and elsewhere, on the basis that that term, investment  
17 contract, is vague, have failed, whether as applied or a facial  
18 challenge. We expect that to be true here. The only reason we  
19 are not moving to strike that defense now is because sometimes  
20 courts prefer to rule on that at the summary judgment stage.

21 Looking at whether the respective defendant had actual  
22 notice, we think it's pretty clear, and we have alleged in our  
23 complaint, that Coinbase has actual notice. They integrated  
24 *Howey* into their listing process. They disclosed the very risk  
25 that they would be found to be violating the securities laws.

1 Thank you, your Honor.

2 THE COURT: Thank you very much. Just give me a  
3 moment to take a note of that. Then I'll hear from Mr.  
4 Mancuso.

5 Let's take a 10-minute break. I will be back as soon  
6 as I can

7 (Recess)

8 THE COURT: I'm confident everyone has used the break  
9 to streamline what they want to say to me.

10 Mr. Mancuso, I believe it's you on the motion to  
11 strike that, I don't know if you know, I don't want you to  
12 file.

13 MR. MANCUSO: Understood, your Honor. If you will  
14 indulge me just briefly.

15 THE COURT: Briefly.

16 MR. MANCUSO: The reason we put it in our letter is  
17 because we believe that there is no daylight between your  
18 Honor's decision to deny defendants' motion with regard to the  
19 major questions doctrine and striking that affirmative defense.  
20 The standard is no question of fact, no question of law, and  
21 prejudice to the plaintiff, and we believe there are no facts  
22 at issue here. Obviously, Coinbase wouldn't have moved to  
23 dismiss it if they thought there was a factual issue that could  
24 change your Honor's decision on major questions.

25 THE COURT: I thought I just heard Mr. Savitt say a

1 moment ago that really the reason they weren't pushing the  
2 issue was because they think you are going to fall at the first  
3 hurdle and I don't even have to get to the issue of major  
4 questions doctrine, and that's sort of in the back pocket or in  
5 reserve in case something were to come up.

6 But go ahead. Keep going.

7 MR. MANCUSO: Understood. But they indicated, at  
8 least in their letter, that that is going to be part of their  
9 motion to dismiss, so we think it is ripe that the Court  
10 decides whether this is properly in the case or not. If the  
11 Court denies their 12(c) motion, it should be stricken as an  
12 affirmative defense. As I said before, the standard for the  
13 two doesn't seem to be that there is any daylight between them.  
14 It can be decided as a matter of law.

15 THE COURT: Perhaps I misunderstood Mr. Savitt. I  
16 thought what he was saying was, look, Failla, you can, just  
17 looking at the pleadings and materials you can consider, you  
18 can find, as a matter of law, that these things are not subject  
19 to regulation and therefore that the complaint falls apart.

20 But if, heaven for fend, you find that these things  
21 are possibly within the purview of the securities laws, then go  
22 to the major questions doctrine and basically decide that the  
23 commission can't do that because of either a change in position  
24 or an arrogation of power they don't have or some other reason.  
25 That's what I'm understanding.

1 I guess I am saying, why do I need to do the motion to  
2 strike if there are several places in which the major questions  
3 doctrine may come up. If it turns out that in none of those  
4 places does it succeed, then, again, I am still not sure there  
5 is going to be, for example, additional discovery or -- I don't  
6 know how it hurts you to have it in the case, but that's where  
7 you can help me.

8 MR. MANCUSO: Understood, your Honor.

9 We believe that every affirmative defense, if any  
10 other cases in this space are an indication, will be used to  
11 purportedly justify intrusive discovery into the SEC's internal  
12 communications and emails, and we think that an affirmative  
13 defense should be dismissed as a matter of law or it has  
14 insufficient legal basis, that it should be decided up front  
15 and should be out of this case as early as possible. We think  
16 if your Honor is treating this legal issue at this early stage  
17 based on -- I know their position -- I wasn't totally clear  
18 from their motion -- their motion letter how low on the food  
19 chain they may have felt the major questions doctrine is.

20 But as your Honor characterized what Mr. Savitt said,  
21 it may be their last argument, but it's still going to be their  
22 argument that our case should be dismissed on that basis.

23 We believe that the other direct arguments on *Howey*  
24 and secondary transactions will fail and that your Honor will  
25 have to rule on the major questions doctrine, and, therefore,

1 we are proposing moving to strike because we believe it's the  
2 same legal issue, and your Honor can decide at this early stage  
3 whether this theory of law in their affirmative defense is  
4 properly part of this case. That's the thinking and that's the  
5 reasoning.

6 Just very quickly, we are also planning to move to  
7 strike the equitable affirmative defenses that we believe have  
8 no basis in law, especially equitable estoppel, laches, and  
9 unclean hands, which I believe Judge Liman just ruled recently  
10 out of this court cannot be found against the Federal  
11 Government unless there is extreme extenuating circumstances of  
12 affirmative misconduct, which is not present in this case. I  
13 believe that is specifically with equitable estoppel.

14 And the cases that Mr. Savitt cites in his letter that  
15 we received last night are no different. Those are cases of  
16 extreme circumstances, if they were even held against the  
17 Federal Government.

18 That's the basis of our motion.

19 THE COURT: I thought for a moment there, sir, you  
20 were burying the lead because I heard the words intrusive  
21 discovery.

22 It's your belief, sir, if that these defenses go  
23 forward, the quantum of discovery sought by defendants from the  
24 commission will somehow change?

25 MR. MANCUSO: With regard to major questions and abuse



1 of discretion, certainly. We believe they will be used to  
2 justify what they seek. We will oppose them, even if they are  
3 still in the case. But we believe that discovery could be  
4 justified as being broader based on these affirmative defenses,  
5 yes. That would be our prejudice.

6           However, we understand the Court's position and your  
7 skepticism of this, and we would ask if we could take this back  
8 to the office and discuss it and possibly get back to your  
9 Honor about our decision whether to move forward or not.

10           THE COURT: Let me say this, lest I forget. I'm  
11 assuming, given the sheer number of people in the room, that  
12 someone is getting the transcript of this conference, so I am  
13 not going to impose someone the obligation of doing it.

14           I am also going to ask the parties when we break if  
15 the parties could meet and confer, in light of all the  
16 discussions we have had today, and propose a briefing schedule  
17 that accommodates one or both motions with a realistic time  
18 frame, and, with that, I'll sign it. I was going to give the  
19 parties a week to get back to me on that because I didn't know  
20 what folks' schedules were. That, I would hope, would give you  
21 the chance to talk to whomever you need to speak with.

22           Again, I can be skeptical, but it doesn't mean I am  
23 going to be closed-minded about it. If you want to persuade  
24 me, you're certainly welcome to try, and I do appreciate it,  
25 but I did just -- I think what I'm reacting from, and it's

1 something I have seen recently, is, I believe, and you will  
2 excuse me if I'm misquoting this, but I believe there is a  
3 decision from Judge McMahon in which I think she says that  
4 motions to strike affirmative defenses are the stupidest thing  
5 ever. I'm kind of quoting that, but I'm kind of just giving  
6 the gist. Maybe I am just translating my Judge McMahon  
7 knowledge. I think that's probably just in my head. So thank  
8 you, sir. Much appreciated.

9 Anything else?

10 MR. MANCUSO: One thing. We did meet and confer with  
11 counsel a few days ago about a briefing schedule.

12 THE COURT: I knew you had, but you hadn't heard me by  
13 then. I did not know if folks wanted to rethink, in light of  
14 what I've said.

15 MR. MANCUSO: If Coinbase's letter is any indication,  
16 I know they hadn't heard you in person, we would like to  
17 discuss with them if they are rethinking it.

18 MR. PEIKIN: Your Honor, of course we will meet and  
19 confer, in light of what you said today.

20 THE COURT: Mr. Peikin, I thank you very much.

21 MR. MANCUSO: Thank you, your Honor.

22 THE COURT: If I can just ask the folks at the front  
23 table from whom I have not heard.

24 Anything you want to add? You are here. You are  
25 allowed to talk.

1 MS. STEWART: No, your Honor. Thank you very much.

2 MR. KURUVILLA: No, your Honor. Thank you for the  
3 opportunity.

4 THE COURT: Much appreciated.

5 From my friends at the back table, does someone want  
6 to be heard in reply?

7 Mr. Peikin, you are taking over?

8 MR. PEIKIN: I don't think I am taking over.

9 THE COURT: Let me not step into that thicket.

10 Would you like to add to what Mr. Savitt said?

11 MR. PEIKIN: I just want to make two what I think will  
12 be brief points.

13 You asked the people at the front table whether the  
14 commission has spoken about whether Bitcoin or Ethereum are  
15 securities, and what you were told was the commission has only  
16 spoken about whether Bitcoin is a security.

17 On June 14, 2018, a person named Bill Hinman, who was  
18 then the director of corporation finance, gave a speech called  
19 *When Gary met Howey Plastics*, and it's a speech that's gotten a  
20 lot of attention, and everybody sitting at the front table is  
21 very familiar.

22 THE COURT: I think I actually have it on my screen  
23 right now.

24 MR. PEIKINL: In that speech Mr. Hinman said -- I'm  
25 reading from it -- putting aside the fundraising that

1 accompanied the creation of Ether, based on my understanding of  
2 the present state of Ether, the Ethereum network and its  
3 decentralized structure, current offers and sales of Ether are  
4 not securities transactions.

5 Now, this case is not about Ether, but I think the  
6 position of the people at the front table reflects on their  
7 position about Mr. Gensler's testimony, under oath, before  
8 Congress, in which -- and I think a fair reading of what he  
9 said is not that he was talking about Bitcoin or he was new on  
10 the job. He was saying that platforms like Coinbase's need  
11 congressional authorization for them to be regulated. That's  
12 the gravamen of what he said.

13 I know the commission wishes that he hadn't said  
14 things like that, because it impacts their position in this  
15 litigation, but you can't just will away things like what  
16 Mr. Hinman said and what Chair Gensler testified, and I think  
17 those things are going to be important.

18 THE COURT: Fair enough. Perhaps I misspoke earlier  
19 in saying that I understood it was being presented to me for  
20 optics and background information. You are not making an  
21 estoppel argument, or are you?

22 MR. PEIKIN: I think we will have to see how that  
23 plays out, your Honor, but I think it certainly is relevant.

24 I want to just raise one other point, which is, you  
25 reflected some discomfort with the idea that the commission

1 could authorize Coinbase's S-1 and allow it to become public,  
2 and your gut suggested to you that there seems to be something  
3 wrong with the idea that that's of no legal import, as the  
4 commission now says. The fact that they declare a registration  
5 statement effective says nothing about whether they are  
6 blessing, or maybe some less strong word, proving of the  
7 underlying business.

8 The fact is, other judges have had the exact same  
9 instinct that you have had and have said, in numerous  
10 instances, the fact that the commission reviews and authorizes  
11 a registration statement is of some legal weight.

12 It's clear that the commission has repeatedly refused  
13 to review authorized registration statements for companies  
14 because of concerns about the legality about their underlying  
15 business. It has done that repeatedly with cannabis companies.  
16 It did it repeatedly with betting companies. And here  
17 securities registration is the core competency of this agency.

18 So the idea that the commission could authorize the  
19 offer and sale of Coinbase's securities to millions of retail  
20 investors and then turn around and flip-flop and say, oh,  
21 sorry, you are running a completely illegal business --

22 THE COURT: But not merely that. An S-1 registration  
23 statement for Coinbase to provide the very platform that  
24 apparently I'm being told today violates the securities laws.  
25 That's what you're really saying.

1 MR. PEIKIN: Yes. All I'm just saying, to the extent  
2 that you have some core discomfort with the idea that this  
3 counts for nothing, we think your instinct is correct.

4 THE COURT: Thank you.

5 MR. SAVITT: Your Honor, if I might just add one or  
6 two points.

7 THE COURT: Of course.

8 And I'm not at all hurrying you up, sir. I am just  
9 letting the parties know that in about ten minutes I have an  
10 arraignment. I am sure we will be done by then.

11 Thank you, sir.

12 MR. SAVITT: Thank you, your Honor. We will be very  
13 quick.

14 I did want to pick up on Mr. Peikin's point regarding  
15 Bitcoin and Ether. Because while it's true that in some  
16 important respect the remark of Chair Gensler go to equities  
17 and optics and potentially the major question doctrine, the  
18 following point does not. It's an important analytical one.

19 Bitcoin and Ether are commodities. We think that's  
20 conceded. When a Coinbase customer buys tokens on Coinbase,  
21 the ones at issue in this lawsuit, she is buying no more and no  
22 fewer rights or interests than when she buys any other token,  
23 including Ether and Bitcoin.

24 There is no principal basis, no legal basis, no  
25 economic basis for the SEC's distinction between the tokens

1 that we now know are commodities beyond the SEC's regulatory  
2 power, beyond its remand on the one hand and those that it  
3 claims in this lawsuit are securities, and that is a  
4 fundamental analytical point that we hope to elaborate for the  
5 Court in our briefing.

6 Your Honor, you asked in your colloquy with plaintiff  
7 here how do people in the space know what is a security and  
8 what's not in the SEC's contemplation. The candid answer is,  
9 they don't. No one has any idea. You find out when you get a  
10 backwards-looking, after-the-fact enforcement action, the  
11 commission having declined, over the repeated requests, among  
12 others, of our client to promulgate rules that would permit at  
13 least the industry to understand the SEC's position.

14 I briefly just wanted to make sure that the Court had  
15 the latest information on the *LBRY* case because it was a  
16 decision two days ago. I just didn't want it to be left with  
17 any suggestion that that case bears on the secondary trading  
18 issue, and I'm, admittedly, with a couple of ellipses to make  
19 this sensible to the Court, but what the judge said there was,  
20 given --

21 THE COURT: Slow down, please. I know you're trying  
22 to be attentive to my schedule, but I want to be sure that we  
23 get what we are all saying.

24 MR. SAVITT: Thank you, your Honor. My apologies.

25 What the Court said is, given the SEC's litigating

1 posture, the issue of secondary trading has not been litigated  
2 in this case. I take no position whether the registration  
3 requirement applies to secondary market offerings and goes on  
4 to hold, therefore, that the remedial order in that case can't  
5 apply here.

6 I have some copies of this decision, if it would be  
7 useful for me to hand them up to the Court.

8 THE COURT: Yes, they would be welcome. Thank you.

9 Ms. Noriega, if you would accept them from Mr. Savitt.

10 MR. SAVITT: I think the final point we just wanted to  
11 make, and it's in the nature, your Honor, of a clarification,  
12 respectful as we are of the Court's time, is that our friends  
13 on the other side mentioned the *Balestra* case. That is one  
14 that we think is not applicable to the proposition for which it  
15 was stated.

16 THE COURT: You weren't going to say that it was  
17 wrongly decided.

18 MR. SAVITT: It may or may not be wrongly decided, but  
19 I was going to make the point that it was an issuer case. It  
20 was an ICO case, not a secondary trading case. And contrary to  
21 what we heard in the letter submitted a few days ago and this  
22 morning, the proposition that there was no contract in that  
23 case, no undertaking, isn't so. The Court found that in  
24 exchange for ICO funds, the issuer promised to launch and  
25 improve the ATB blockchain. Real attention to the various



1 decisions that have come down is going to be important.

2 I am certain, with a final point, picking up on a  
3 theme that our good friend on the other side made about the  
4 word scheme, we are going to be litigating that point, but we  
5 really are confident, your Honor, when the law and precedent is  
6 put before the Court, you will see that the bedrock principle  
7 remains. This isn't going to be surprising linguistically. To  
8 have an investment contract, you got to have a contract of some  
9 sort, and that is what the law will show when we are able to  
10 present it to your Honor.

11 Happy, of course, to take any further questions that  
12 your Honor might have.

13 THE COURT: At the very end of my discussions with Mr.  
14 Mancuso we spoke about the motion to strike, and I have done my  
15 diplomatic best to express some concerns about it. Perhaps you  
16 want to remain silent, thinking that it can only hurt the  
17 matter, but if you want to speak on the motion to strike issue,  
18 I will hear from you.

19 MR. SAVITT: Thank you, your Honor.

20 Our inclination on that is to try and work with  
21 plaintiff here to see if we can come to an agreement regarding  
22 whether the motion ought to go forward and, if it ought to go  
23 forward, how it should be presented.

24 We don't take any position whether the motion should  
25 happen. We agree with the Court that it is highly unlikely to

1 be granted and is probably not incremental to all the stuff  
2 that we have to get done over the next bit of time.

3 THE COURT: Thank you.

4 I should end, and I perhaps should have began this  
5 way, by thanking those of you who have spoken to me this  
6 morning for the preparation that you have undertaken. It's not  
7 always the case that I have oral argument, and it's certainly  
8 not always the case that I have it at the beginning of motion  
9 practice. But you were all very well prepared, and I'm  
10 grateful for that because it allows me to situate myself better  
11 for any proceedings in this case going forward.

12 Also, I have a sense that somewhere in the audience  
13 are associates or more junior folks who have given their lives  
14 for the papers that I have received, and know that your work  
15 was very much appreciated. Thank you very much, even those who  
16 of you who did not speak.

17 I am asking the parties to get together and meet and  
18 confer about a schedule, about what motions we are having, what  
19 time schedule we are having them on, and what reasonable,  
20 reasonable page limits are necessary to adequately express  
21 these motions. I appreciate it. Mr. Savitt's comment about my  
22 three-page letters, it's just because if I don't have those  
23 limits, I get ridiculous submissions. Please try so hard not  
24 to ask me for 50-page briefs. Also please don't put everything  
25 in footnotes.

1 Unless there is anything else that anyone wants me to  
2 know, I'll let you go to have that meet and confer and to go  
3 forward with this case with my thanks.

4 Sir.

5 MR. MARGIDA: I have to say, I disagree with most of  
6 what Mr. Savitt and Mr. Peikin said, but I know --

7 THE COURT: I am not shocked.

8 MR. MARGIDA: I just want to put that out there. We  
9 have --

10 THE COURT: Government disagrees. SEC disagrees.  
11 Understood. I'm writing it down.

12 MR. MARGIDA: Thank you, your Honor.

13 MR. MANCUSO: Your Honor, when would you like to hear  
14 from us about the briefing schedule?

15 THE COURT: One week, please.

16 MR. MANCUSO: Can do.

17 THE COURT: Thank you, all. Take care, everyone.

18 We are adjourned.

19 (Adjourned)

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